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Nos. 80-1538 and 80-1934

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

JAMES PLYLER and STATE OF TEXAS, et al.,
Appellants

v.

J. and R. DOE, as guardian ad litem for I. DOE, et al.,
Appellees

IN RE: ALIEN CHILDREN EDUCATION LITIGATION,
STATE OF TEXAS and TEXAS EDUCATION AGENCY,
Appellants

v.

UNITED STATES OF AMERICA,
Intervenor-Appellee

and

CERTAIN NAMED and UNNAMED
UNDOCUMENTED ALIEN CHILDREN,
Appellees

Consolidated Appeals from the United States Court of Appeals for the Fifth Circuit.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES

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Motion for Leave to File Brief and Brief *Amicus Curiae* of American Immigration Lawyers Association

The American Immigration Lawyers Association respectfully moves this Court, pursuant to Rule 42 of the Rules of the United States Supreme Court, for leave to file the annexed brief amicus curiae. In support of this motion, the Association states:

1. The American Immigration Lawyers Association is a national association of lawyers practicing immigration, nationality and naturalization law. The organization is supported by dues paid by its members and is dedicated to the legal advocacy of reforms in immigration, nationality and citizenship law. In addition, the Association is dedicated to preserving the statutory and constitutional rights of immigrant and non-immigrant aliens.

2. The issues involved in this case, whether "undocumented aliens" are entitled to equal protection of the laws and whether the state of Texas has established a rational system to bar "illegal aliens" from a free public education, will have a far reaching impact on many of the clients served by members of the Association. An examination of the impact of the immigration laws of the United States is essential to a just resolution of this case. As amicus curiae, the Association seeks to bring before this Court its understanding of the import of the immigration laws of the United States for its decision.

3. The effect of the immigration laws of the United States is relevant to this Court's determination. The specific interests of the Association in the immigration laws is not specifically advanced by either of the parties and may not be adequately addressed by them. Because the Association has specific expertise in the subject of immigration law, it is respectfully submitted that it can serve a useful role as amicus curiae in this case.

For these reasons, the American Immigration Lawyers Association respectfully requests that its Motion for Leave to File the annexed brief amicus curiae be granted.

Respectfully submitted,
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TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I The equal protection clause of the Fourteenth Amendment applies to all persons physically present within the State of Texas	3
II §21.031 of the Texas Education Code as written is not rationally related to a legitimate state objective	8
CONCLUSION	16
APPENDIX	17

TABLE OF AUTHORITIES

Cases	*Page*
Bolanos v. Kiley, 509 F.2d 1023 (2 Cir. 1975)	6, 9
Buckley v. Valeo, 424 U.S. 1 (1976)	9
Burrafato v. United States Department of State, 523 F.2d 554 (2d Cir. 1975) cert. denied 424 U.S. 910 (1976)	5 6
Certain Named and Unnamed Non-citizen Children and Their Parents v. State of Texas, ___ U.S. ___, 101 S.Ct. 12, 65 L.Ed 2d 1151 (1980)	7
De Canas v. Bica, 424 U.S. 351 (1976)	9, 10, 12, 15
Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980)	9
Elkins v. Moreno, 435 U.S. 647 (1978)	12
Graham v. Richardson, 403 U.S. 365 (1971)	8
Hampton v. Mom Sun Wong, 426 U.S. 88 (1976)	8

Cases *Page*

In Re: Alien Children Education Litigation, 501 F.Supp. 544 (S.D. Tex. 1980) 6, 7, 9, 11, 15

Johns v. Department of Justice, 653 F.2d 884 (5th Cir. 1981) 13

Leng May Ma v. Barber, 357 U.S. 185 (1958) . 4, 5, 6

Matthews v. Diaz, 426 U.S. 67 (1976) 7, 8

Nyquist v. Mauclet, 423 U.S. 1 (1977) 15

San Antonio Independent School District v. Rodriques, 411 U.S. 1 (1973) 7

Schweiker v. Wilson, ___ U.S., ___67 L.Ed. 186 (1981) 9

Shaughnessy v. U.S. ex rel Mezei, 345 U.S. 206 (1953) 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. IV, Section 4 10

U.S. Const. Amend. V 7, 9

U.S. Const. Amend. XIV 2, 3, 16

STATUTES AND REGULATIONS

Texas Education Code §21.031 ..... 2, 8, 11

Refugee Act of 1980 (Pub. L. 96-212, Mar. 17, 1980, 94 Stat. 109) 6

Immigration and Nationality Act of 1952, 8 U.S.C. 1101, et seq. 4, 11, 16

§101, 8 U.S.C. 1101 ..... 11, 12

§201, 8 U.S.C. 1151 13

TABLE OF AUTHORITIES — *(Continued)*

Cases	*Page*
§203, 8 U.S.C. 1153	13
§208, 8 U.S.C. 1158	13
§212, 8 U.S.C. 1182	4, 5
§231-240, 8 U.S.C. 1221-1230	4
§232, 8 U.S.C. 1222	4
§241-250, 8 U.S.C. 1251-1260	4
§241, 8 U.S.C. 1251	5
§242, 8 U.S.C. 1252	13
§243, 8 U.S.C. 1253	4, 6
§244, 8 U.S.C. 1254	13
§245, 8 U.S.C. 1255	13
§249, 8 U.S.C. 1259	13
7 C.F.R. §273	12
8 C.F.R. §109	11
8 C.F.R. §208	6
8 C.F.R. §242	13
8 C.F.R. §243	13, 14

MISCELLANEOUS

86 Fed. Reg. 25 080 (1981) 11

1A C. Gordon & H. Rosenfield, Immigration Law and Procedure 4, 5, 13, 14

Operations Instruction §103 ..... 14, 17-18

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BRIEF *AMICUS CURIAE* OF AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICUS CURIAE*

The American Immigration Lawyers Association is a non-profit association of lawyers practicing immigration, nationality and citizenship law. The Association is supported by the dues paid by its members and is dedicated to the just administration of the immigration laws of the United States. In addition, the Association is dedicated to the principles of fair treatment of aliens whether they be immigrant or non-immigrants.

As amicus curiae, the Association seeks to bring before this Court the import of the immigration laws of the United States in deciding this case. Because this interest in the present case will have a significant impact upon aliens and because the impact of the immigration laws of the United States is not specifically advanced by either party, they may not be adequately addressed by the existing parties.

SUMMARY OF ARGUMENT

The equal protection clause of the Fourteenth Amendment applies to all persons physically present within the State of Texas. The application of the equal protection clause does not require the State of Texas to provide all social welfare benefits including a free public education to all aliens. Decisions of this Court interpreting federal immigration law do not support the state's argument that the equal protection clause does not apply to "illegal aliens".

§21.031 of the Texas Education Code as written is not rationally related to a legitimate state objective. The State of Texas is not required to provide a free public education to all aliens. However, the statute as written does not further a legitimate state objective. The state may not seek to deter illegal immigration in a manner inconsistent with federal immigration laws. The State of Texas has not sufficiently defined the class of aliens to

be deprived of a free public education in relation to federal immigration laws and practice.

ARGUMENT

I

The Equal Protection Clause of the Fourteenth Amendment Applies to All Persons Physically Present Within the State of Texas

The equal protection clause of the Fourteenth Amendment is applicable to all persons physically present within the State of Texas. The equal protection clause is not a source of substantive rights and, therefore, its application to the state does not require, by itself, the conferral of social welfare benefits. The application of the equal protection clause does require that differences between classes of individuals rationally relate to legitimate state objectives. Amicus does not argue that the State of Texas must provide social welfare benefits including a free public education to all aliens present within the State of Texas regardless of immigration status. Amicus does argue that the equal protection clause does apply and that the manner in which the State of Texas has sought to exclude classes of aliens does not sufficiently define the class of aliens who may legitimately be excluded from a free public education.

The State of Texas argues that unlike the due process clause of the Fourteenth Amendment the equal protection clause does not apply to "illegal aliens". An examination of the wording of Section 1 of the Fourteenth Amendment of the United States Constitution provides no support for the State's argument. A state is not to deny, ". . . .to any person within its jurisdiction the equal protection of the laws." The State of Texas seeks to add judicial gloss to the words "person within its jurisdiction" that would require the person to be legally present.

Nothing in the language of the Constitution supports this interpretation.

In support of its argument, the state relies on the decisions of this Court and of other federal courts interpreting federal immigration law. See Brief of Appellants at pp. 14-17. In doing so, the state misunderstands federal immigration law and misinterprets the cases decided thereunder.

The state places principle reliance upon *Leng May Ma v. Barber*, 357 U.S. 185 (1958). In this case the Court determined, wholly as a matter of statutory construction, that an alien paroled into the United States pursuant to §212(d)(5) of the Immigration and Nationality Act, 8 U.S.C. §1182, was not "within the United States" for the purpose of availing himself of §243(h) which allows for witholding of deportation in certain cases. The state's reliance upon this case to support its argument that persons not legally within the United States are not within the jurisdiction of the State of Texas is without foundation.

The Court's decision in *Leng May v. Barber*, supra, recognized the fundamental statutory difference between *exclusion* proceedings and deportation proceedings. Exclusion proceedings were then and are now governed by Chapter 4 of the Immigration and Nationality Act and deportation is governed by Chapter 5 of the Act. See *Leng May Ma v. Barber*, supra, at 187; §§231-240 and §§241-250 of the Immigration and Nationality Act.

Exclusion proceedings may arise when an application is made to enter the United States by an alien. The alien is to be inspected upon arrival and may be refused admission or a determination as to the alien's admissibility may be deferred. See §232 and §212(d)(5)(A) of the Act, and 1A C. Gordon & H. Rosenfield, *Immigration Law and Procedure*, §3.16(d) (1981). An alien paroled into the United States pursuant to these provisions is not "admitted" within the meaning of the Immigration Act. These provisions merely allow the Immigration and Nat-

uralization Service to defer a determination as to admissibility. Thereafter, the alien is treated as though no entry has been made into the United States. See 1A C. Gordon and H. Rosenfield, *Immigration Law and Procedure*, §3.17(c). This is an entirely statutory construct for the purpose of allowing for a later considered determination of the alien's admissibility. These concerns have no relevance whatsoever to the State of Texas which will make no determination as to the admissibility of aliens.

It is important to note that the distinction between exclusion proceedings and deportation proceedings is not one that relates to the legality or illegality of the alien's presence. An alien who obtains entry into the United States by fraud, whose presense therefore is not legal, is removed from the United States by deportation proceedings. See §241(a)(1) and §212(a)(19) of the Act. Further, an alien who enters the United States without inspection, presumably a number of the undocumented school children, is likewise in deportation proceedings, §241(a)(2). See Gordon and Rosenfield, supra, at §3.16(b).

An alien who enters the United States illegally, i.e., without inspection, has made an "entry" and therefore is within the United States just as a person who was inspected and admitted, but unlike a person who was paroled. Thus, the distinction recognized in *Leng May Ma v. Barber*, supra, was merely a recognition that certain aliens physically present in the United States would be treated as not within the United States for purposes of removing them from this country. The distinction was not between those legally present within the United States who were entitled to certain relief and those here illegally who did not have such legal rights.

Likewise, *Burrafato v. United States Department of State*, 523 F.2d 554 (2d Cir. 1975), cert denied. 424 U.S. 910 (1976) relied upon by the State of Texas, Brief of Appellants at p. 15, is inapposite. The holding of this case is that Consular decisions to grant or refuse visas are not

reviewable by the Federal Courts. The Court did state, in *dicta*, that if *Burrafato* had been legally in the United States he might be able to force the Department of State to follow its own regulations but that his fundamental claim for review of the Consular proceedings did not turn upon the legality of his presence in the United States.

The District Court below in *In Re: Alien Children Education Litigation*, 501 F.Supp. 544, 568-69 (S.D. Tex 1980) correctly analyzed this issue in holding that physical presence within the state equated with being within its jurisdiction. In *Shaughnessy v. U.S. ex rel Mezei*, 345 U.S. 206 (1953), this Court focused on physical presence of the alien to determine the application of the due process clause. See also *Bolanos v. Kiley*, 509 F.2d 1023, 1025 (2d Cir. 1975) where Judge Friendly noted that the equal protection clause would apply to all aliens present in the United States even if they were illegally present, citing *Shaughnessy v. U.S. ex rel Mezei*, supra. The appellants advance no convincing reason to distinguish the equal protection clause from the due process clause here at issue. Accordingly, the equal protection clause applies to all persons physically present in accord with this Court's due process analysis.

The language of §243(h) of the Immigration and Nationality Act has since been changed by Congress and an alien in exclusion proceedings may now request withholding of deportation pursuant to this provision. See The Refugge Act of 1980 (Pub. L. 96-212, Mar. 17, 1980, 94 State 109), §212(e) which amends §243(h) of the Act, 8 U.S.C. §1253; 8 C.F.R. §208.3(b) and §208.9. This change in the law serves to emphasize the solely statutory construction that was the basis of the Court's decision in *Leng May Ma v. Barber*, supra.

The State of Texas also argues that if the equal protection clause is applied to the state, it will be required to provide benefits to aliens that the federal government does not provide. The state argues this is so because the

equal protection clause, unlike the due process clause, creates rights to government benefits. Brief of Appellants at pp. 14 and 17-22.

The state's argument misconceives the nature of the equal protection clause and confuses the state's role, vis-a-vis aliens, and that of the federal government. Initially, the equal protection clause creates no rights, *In Re: Alien Children Education Litigation*, supra, at 555-556, citing *San Antonio Independent School District v. Rodriques*, 411 U.S. 1, 59 (1973) (Stewart J. Concurring). The equal protection clause is a provision for even handed treatment only if a right exists and does not require the provision of benefits. The District Court in *In Re: Alien Children Education Litigation*, supra, at 565, recognized that states may treat aliens differently from lawful permanent residents and citizens for reasons relevant to valid governmental objectives that did not impinge upon any fundamental right.

Not only does the equal protection clause not require the provision of governmental benefits, it does not impose a barrier against disparate treatment. Moreover, the equal protection component of the due process clause of the Fifth Amendment has been interpreted to apply to the federal government's treatment of aliens, and has not required the provision of all governmental benefits to aliens. See *Matthews v. Diaz*, 426 U.S. 67, 77-80 (1976).

The State of Texas fundamentally misconceives the role of the state in immigration matters. Immigration is pre-eminently a federal concern and the federal government is granted great discretion in the manner in which it treats even lawful aliens, *Matthews v. Diaz*, supra at 81. It is Congress' determination on matters of immigration law that are given great deference by the courts. See *Certain Named and Unnamed Non-citizen Children and Their Parents v. State of Texas*, ___U.S. ___, 101 S.Ct. 12, 65 L.Ed. 2d 1151, 1155 (1980) wherein Justice

Powell vacated the stay granted by the United States Court of Appeals for Fifth Circuit. Even the power of the federal government, to determine the rights of aliens, is not without limits, *Hampton v. Mom Sun Wong*, 426 U.S. 88 (1976). Certainly, the federal government has the power to regulate the rights of aliens where the state could not. Compare *Matthews v. Diaz*, supra, with *Graham v. Richardson*, 403 U.S. 365 (1971).

The state correctly notes that the federal government has placed substantial limits on the receipt of governmental benefits by even lawful aliens. Brief of Appellant at p. 18. However, the legitimate interests of the State of Texas are not to be equated with the plenary powers of the political branches of the federal government to regulate the conduct of aliens.

In summary, the State of Texas advances no compelling reasons why the plain language of the equal protection clause should not be applied and the limitations imposed by this provision be applied to the State of Texas with regard to every alien physically present in the State of Texas. Secondly, the state advances no compelling policy reasons not to apply the equal protection clause to the aliens seeking admission to the public schools of the State of Texas.

II

Section 21.031 of the Texas Education Code as Written is not Rationally Related to a Legitimate State Objective.

Amicus does not argue that the State of Texas could not, consistent with federal immigration laws, refuse to provide a free public education to a class of aliens. Amicus does argue that a statute creating such a classification must be narrowly and carefully drawn so as to ra-

tionally relate to legitimate state objectives. Since federal immigration law, regulations and practice will determine the length of an alien's stay in the United States and not state law, any such statute must create classifications that relate directly to federal immigration status. The fundamental failure of the Texas statute is to rationally relate its means of classification to its legitimate objective.

While the equal protection component of the due process clause is subject to the same analysis under the Fifth Amendment as the equal protection clause under the Fourteenth Amendment, *Buckley v. Valeo*, 424 U.S. 1, 93 (1976), the State of Texas may not forbid the receipt by aliens of benefits that the federal government could forbid. The equal protection tests under the respective provisions are essentially the same, is the difference in treatment justified by a rational relationship to a legitimate governmental objective. *Schweiker v. Wilson*, ____U.S ____, 67 L.Ed. 186, 195 (1981). What is a legitimate governmental objective for Congress or the Executive Branch in the immigration area often will not be a legitimate concern of the state. See *De Canas v. Bica*, 424 U.S. 351 (1976).

The state advances two objectives for its exclusion of illegal or undocumented aliens from its public schools. The first is the protection of its resources and second, is to prevent incentives for illegal immigration of school age children. This latter objective is not a proper one for the State of Texas. See *Alien Children Education Litigation*, supra, at 578. Even if a legitimate consideration, the statute only deters illegal immigration in a very marginal way, *Doe v. Plyler*, 628 F.2d 448, 460-461 (5th Cir. 1980).

It is clear from the Brief submitted by the State of Texas that its concern with deterring illegal immigration in light of the alleged failure of the federal government to regulate immigration is its primary concern. Brief of

Appellants at pp. 5-13. Unlike the state's power over employment at issue in *De Canas v. Bica*, supra, a state objective to regulate the entry of aliens is not permissible. The regulation of the entry of aliens is preeminently and exlusively a federal concern, *De Canas v. Bica*, supra, at 354.

The failure of the federal government to enforce existing immigration laws or to provide immigration laws that satisfy the State of Texas, does not allow the appellants to impose their own system of immigration laws. The state's reference to Art. IV, §4 of the United States Constitution appears to make an argument that where the federal government fails to prevent illegal immigration, its obligations under this provision of the Constitution is breached and therefore the state can step in. This analysis is plainly erroneous.

The state's remedy is with the Congress and Executive branches of the United States. Stricter immigration laws and more adequate funding for the enforcement of existing laws is a concern to be addressed solely to the Congress of the United States and the Executive Branch.

Amicus does not argue that the state is pre-empted from taking any action that effects aliens. Such an argument would be plainly foreclosed by *De Canas v. Bica*, supra. Amicus does argue that the state may not rely upon as a legitimate state objective, the deterence of illegal immigration. The means to deter such immigration are wholly the concern of the federal government.

This Court's decision in *De Canas v. Bica* held that the State of California was not per se excluded from regulating the conduct of illegal aliens once present in the state. Congress' exclusive power is over the determination whether to admit an alien and over the circumstances under which he may remain, *De Canas*, supra, at 355. The California statute was in harmony on its face with federal law limiting the ability of aliens to be em-

ployed while in the United States. The state objectives were to protect the jobs of its citizens and prevent an adverse impact on their working conditions, which concerns are clearly legitimate state interests. Unlike the second justification offered by the State of Texas, there was not any assertion of a right to deter illegal immigration. To allow the state to assert such a deterence to illegal immigration would be to open the door to every form of deprivation that a state could conceive of to deter immigration. In summary, the failure of the federal government to prevent illegal immigration does not allow the state to step in and attempt its own form of regulation.

The first consideration advanced by the state, that of preserving its resources for its citizens and lawful permanent residents is plainly a legitimate state interest. If this interest can be advanced by identifying the class to be deprived of a free public education in a manner consistent with federal regulation of immigration, §21.031, would be constitutional. However, the State of Texas has not constructed such a statutory scheme.

Texas Education Code §21.031 provides for a free public education for citizens or legally admitted aliens within the prescribed age group. A "legally admitted alien" is not defined. The state equates the statutory provision with the terms "illegal aliens" or "undocumented aliens", *Alien children Education Litigation*, supra, at 554-555.

The Immigration and Nationality Act and the regulations of the Immigration and Naturalization Service extensively address the question of whether non-immigrant aliens in certain classifications are permitted to work and extensively regulate the circumstances under which permission may be given. See §101(a)(15) of the Act, and Vol. 46, No. 86 Federal Register 25 080 (May 5, 1981), 8 C.F.R. §109.1 *et seq*. The Act and Regulations do not extensively regulate who may attend public

school. The Act does provide for a temporary student visa, §101(a)(15), for those entering the United States to attend school. There is not a clearly defined federal position as to which aliens may attend public school.

There is nothing inconsistent with federal policy by the state adopting a policy of not encouraging illegal immigration. However, the state's class definition must relate to those persons the immigration laws and the Immigration Service determine to be aliens who will not remain in the United States. Where the federal authorities determined that an alien may be permitted to remain, the state may not deny such an individual a free public education consistent with the federal decision to allow the alien to remain. The state may not impose additional conditions upon an alien who is allowed to remain in the United States beyond those imposed by the immigration laws. See *Elkins v. Moreno*, 435 U.S. 647 (1978)

The statute at issue in *De Canas v. Bica*, supra, at 353 n. 2, was assumed for purposes of that decision to equate "illegal aliens" with those aliens not permitted to work under federal immigration laws and regulations, whether this was true as applied was left open on remand.

In this case, there is no attempt to harmonize the state prohibition with federal immigration law. A comparison of the state's vague definition of who is excluded from a public education contrasts sharply with the regulation of the Department of Agriculture prohibiting certain classes of aliens from receiving food stamps. 7 C.F.R. §273.4 and §273.2(f). These regulations are tied closely to the existing immigration status as determined by the Immigration and Naturalization Service and do not seek to make an independent determination as to the legality or illegality of the alien's presence. The verification provision looks to documentation provided by INS.

The complexity of the immigration laws does not make a determination of illegality one that the state can

readily make, nor does the term "undocumented alien" aid this determination. There are many and varied means for an alien who is in the United States without a legal status to become legal. §245 of the Act, 8 U.S.C. §1255, provides for adjustment of status of a non-immigrant to that of a person admitted for permanent residence. Adjustment is provided for where an alien has an immigrant visa available to him. Immigrant visas are available based on familial relationships, §201(a), §203(a)(1-2) and (4-5) and on the basis of employment, §203(a)(3)(6). Immigrant visas are also available pursuant to §208 for refugees and §249 for aliens entering prior to June 30, 1948. In addition, deportation may statutorily be withheld pursuant to §243(h) and suspended pursuant to §244.

There are varied means that may be available to "illegal aliens" to change their status. Some of the above may well be available to the parents or the school children themselves.

Even where an alien is clearly deportable, he may still remain in the United States with the permission of INS. Deportation is by no means automatic and is within the discretion of the Attorney General which discretion has been delegated to the Immigration Service. See Gordon and Rosenfield, supra, at §7.2(a) (1981). See also *Johns v. Department of Justice*, 653 F.2d 884, 890-891 (5th Cir. 1981).

The Department of Justice has, by regulation, provided for extensive means to stay deportation indefinitely. See 8 C.F.R. §242.5 and §243.4. 8 C.F.R. §242.5 provides for voluntary departure prior to commencement of a hearing. This provision authorizes district directors of INS to allow voluntary departure under a variety of circumstances pursuant to the discretion granted in §242(b) of the Act. Among the classes authorized for voluntary departure is that in §242.5(a)(2)(i) for natives of a foreign contiguous territory or §242(a)(2)(vii) where

the district director determines there are compelling factors warranting grant of voluntary departure.

8 C.F.R. §243.4 grants discretion to the district director to stay deportation after the grant of a final order of deportation. Further, the Immigration Service has an extensive Operations Instruction (O.I.) 103.1(a)(1)(ii) (1978), which provides for "deferred action" for deportable aliens. The complete text of the Operations Instruction is set forth in an appendix to this brief. Deferral is to be granted on grounds of humanitarian factors and the district director for INS should consider, *inter alia;* tender age; years in U.S. and family situation. See also Gordon and Rosenfield, supra at §5.7(e)(7).

This review of immigration law is to demonstrate that there is not a clear cut status of "illegality" or that of being "undocumented" under the Immigration Act and Regulations, nor is the effect of a lack of immigration status clear. Great discretion has been granted to the Attorney General who, in turn, has delegated this discretion to the Immigration and Naturalization Service. Therefore, an alien who is patently without a lawful status under the Immigration Act may be allowed to remain indefinitely within the United States.

Amicus does not argue that the State of Texas may not classify among aliens present within its borders. Amicus does argue that a classification based upon such vague terms as "illegal aliens" or "undocumented aliens" is not rationally drawn in conformity with federal immigration laws. The State of Texas can classify between aliens only by direct reference to the immigration status of the alien as determined by the INS. The State of Texas is not free to make its own determination as to the legality of the aliens presence. This determination has been granted exclusively to the discretion of the Attorney General.

The inherent danger in the Texas statute is that the state is making an independent determination as to who will remain in the United States. The state, in utilizing

terminology that has no relevance to federal immigration law, is sweeping broadly into what is pre-eminantly a federal area. In doing so, the state creates a classification that is not rationally related to the legitimate state objectives of preserving its resources. The state is simply not distinguishing between those persons who may be permitted by INS to remain and those who would be deported.

The question of the application of the California statute was left open in *De Canas v. Bica*, supra. In this case, the statutory scheme of the State of Texas is not in harmony with the regulatory scheme for determining which aliens will be allowed to remain in the United States.

The state also argues that because illegal aliens will not participate fully in the conduct of our goernmental affairs there is an insufficient nexus to the exercise of other rights, such as voting or holding governmental office, to require them to educate illegal aliens. First, it is not at all certain that an illegal alien today will not be a lawful permanent resident tomorrow and three or five years later a citizen of the United States. Secondly, even though an alien may not participate fully in our governmental affairs, the denial of a public education strikes at their very ability to exist in our society. See *Nyguist v. Mauclet*, 432 U.S. 1, 12 (1977). If there was a substantial assurance that these individuals who do not presently have a status recognized by federal immigration laws would only reside temporarily in the United States or would remain without a status permanently then this argument would have merit. However, this is plainly not so. The District Court found that the majority of the undocumented alien school children were here to stay. *Alien Children Education Litigation*, supra at 558. The means to adjust to a legal status as well as the very possible deferability of deportation counsels against any assumption that undocumented aliens will not have a legitimate role to play in our society.

It is amicus' position that the State of Texas may not attempt to regulate the immigration of aliens into the state by depriving their children of a free public education. Further, the State of Texas has not constructed a statutory or regulatory scheme that even attempts to harmonize its determination of illegality with the Immigration and Nationality Act and the regulations and procedures of INS. Lastly, even children without a present status recognized by federal immigration laws may well be with us to stay, and the deprivation that they suffer by the State of Texas' refusal to educate them will have a substantial impact on our society.

CONCLUSION

The equal protection clause of the Fourteenth Amendment applies to all aliens physically present in the State of Texas. The States' classification of illegal or undocumented aliens does not serve rationally legitimate state objectives.

Accordingly, amicus prays this Honorable Court to affirm the decisions of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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APPENDIX

OPERATIONS INSTRUCTIONS 103.1(a)(1)(ii)

(ii) *Deferred action.* In every case where the district director determines that adverse action would be unconscionable or result in undue hardship because of the existence of appealing humanitarian factors, he shall recommend consideration for deferred action category. His recommendation shall be made to the regional commissioner concerned on Form G-312, which shall be signed personally by the district director and the basis for his recommendation shall be set forth therein specifically. Interim or biennial reviews should be conducted to determine whether approved cases be continued or removed from deferred action category. *(Revised)*

When determining whether a case should be recommended for deferred action category, consideration should include but not be limited to the following: (1) advanced or tender age; (2) number of years presence in the United States; (3) physical or mental condition requiring care or treatment in the United States; (4) family situation in the United States — effect of expulsion; (5) criminal, immoral or subversive activities or affiliations — recent conduct. If the district director's recommendation is approved by the regional commissioner the alien shall be notified that no action will be taken by the Service to disturb his immigration status, or that his departure from the United States has been deferred indefinitely, whichever is appropriate. *(Revised)*

Former military deserters at large who participated in the Discharge Review Program during the period April 5, 1977 to October 31, 1977, should be placed in deferred action category if at the time of last entry they were exempt from immigration inspection under the provisions of section 284 of the Act. The procedure outlined in the foregoing paragraphs should be followed. *(Added)*

Each regional commissioner shall maintain statis-

tics on deferred action cases on a current basis, maintained so that data can be readily extracted upon request. The statistics should be maintained in the following categories; (1) number of cases in deferred action category at the beginning of the fiscal year; (2) number of recommendations received fiscal year to date; (3) number of recommendations approved; (4) number of recommendations denied; (5) number of cases removed from deferred action category; (6) number of deferred action cases pending at the end of the fiscal year.